UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 23

Docket No. DE-1221-09-0320-W-1

Alvern C. Weed,

Appellant,

v.

Social Security Administration,

Agency.

January 28, 2010

Alvern C. Weed, Kalispell, Montana, pro se.

Jennifer Randall, Denver, Colorado, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision (ID) that dismissed for lack of jurisdiction his individual right of action (IRA) appeal. For the following reasons, we GRANT the petition for review, REVERSE the ID, FIND that the Board has jurisdiction over the appellant's IRA appeal, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant, a 10-point compensable preference-eligible veteran, filed a 2005 Board appeal (MSPB Docket No. DE-3443-05-0248-I-1) under the Veterans Employment Opportunities Act (VEOA) alleging that the agency violated his veterans' preference rights when it made no selection from a vacancy

announcement for two Social Insurance Specialist Claims Representative positions in the agency's Montana Field Office in Kalispell, Montana, and instead non-competitively selected two non-preference eligible applicants for the positions under the Outstanding Scholar Program. *See Weed v. Social Security Administration*, 107 M.S.P.R. 142, ¶ 2 (2007), *appeal dismissed*, 571 F.3d 1359 (Fed. Cir. 2009). On review, the Board affirmed the finding in the ID that the agency violated the appellant's statutory rights and ordered the agency to reconstruct the hiring for the positions. *Weed*, 107 M.S.P.R. 142, ¶¶ 3-4, 15. The appellant subsequently filed a petition for enforcement of the Board's order. *See Weed v. Social Security Administration*, 111 M.S.P.R. 450 (2009); *Weed v. Social Security Administration*, 110 M.S.P.R. 468 (2009).

¶3 While his first appeal was pending, on June 27, 2006, the appellant filed a complaint with the Office of Special Counsel (OSC), wherein he alleged that the agency's use of the Outstanding Scholar Program to fill the positions in the Montana Field Office was a prohibited personnel practice because there is no statutory or regulatory authority for the program and because the agency violated the implementation instructions issued by the Office of Personnel Management (OPM) when it used the program to fill the positions. Initial Appeal File (IAF), Tab 1, Subtabs 1, 2. In the OSC complaint, the appellant stated that he was a GS-1102-11 Lead Contract Specialist, who was employed by the Department of the Air Force at Malmstrom Air Force Base, Montana. *Id.*, Subtab 1.

¶4 The appellant subsequently filed a second Board appeal in September 2008 alleging that the agency violated veterans' preference rules, discriminated against him in violation of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), and retaliated against him for his successful Board appeal and an Equal Employment Opportunity Commission (EEOC) appeal. *Weed v. Social Security Administration*, 112 M.S.P.R. 320 (2009). In the appeal, the appellant asserted that the agency, without public notice, used the Federal Career Intern Program (FCIP) to non-competitively fill four additional positions in Kalispell, Montana, that were comparable to the positions in his first

appeal. The appellant did not apply for any of the positions, but he alleged that he was unaware of the vacancies and that the agency used FCIP as an "intentional artifice" to exclude him from the opportunity to compete for the positions. *Id.*, ¶ 3. The administrative judge docketed the cases as separate appeals under VEOA and USERRA, and ordered the appellant to show that the Board had jurisdiction over the appeals. *Id.*, ¶ 4. After receiving jurisdictional submissions from the parties, the administrative judge dismissed the appeals for lack of jurisdiction on the basis that the appellant had not been an applicant for any of the positions at issue, and, therefore, he could not make a nonfrivolous allegation of jurisdiction under VEOA or USERRA. *Id.*, ¶ ¶ 4, 5. The appellant petitioned for review of the IDs, and we reversed the IDs, found the Board has jurisdiction over the appellant's claims under VEOA and USERRA, and remanded the appeals for further adjudication. *Id.*, ¶ ¶ 8, 13, 19.

¶5 On January 9, 2009, the appellant sought corrective action under the Whistleblower Protection Act (WPA) from OSC regarding the four positions filled by the agency through FCIP. IAF, Tab 1, Subtab 3. In his complaint, the appellant alleged, in part, that the agency's action constituted retaliation for his protected disclosure of violations of laws, rules, and regulations in his June 2006 OSC complaint. *Id.* On March 30, 2009, OSC issued a closure letter, which notified the appellant that it had terminated its inquiry into his allegations and informed him of his right to file an IRA appeal with the Board. *Id.* Subtab 4. The appellant then timely filed this appeal. *Id.*

¶6 After issuing an order on jurisdiction, and affording the parties an opportunity to respond, the administrative judge dismissed the appeal for lack of jurisdiction. *See* IAF, Tabs 3, 4, 8, 9; Initial Decision (ID) at 4-6. She specifically found that the appellant lacked standing to file an IRA appeal because he was not an agency employee or applicant for employment with the agency when he made his 2006 disclosures to OSC or when the agency allegedly took, or failed to take, a personnel action with respect to him. ID at 5. She also found that the appellant's allegation that the agency used the FCIP process to

retaliate against him failed to meet the definition of a "personnel action" under the WPA. *Id.* The appellant has petitioned for review of the ID, and the agency has filed a response in opposition to the petition. Petition for Review File (PFRF), Tabs 1, 3.

ANALYSIS

¶7 This appeal presents two issues to the Board on review: (1) Was the appellant an "employee" within the meaning of the WPA when he made disclosures to OSC in June 2006, or when the agency allegedly took, or failed to take, a "personnel action" with respect to him; and (2) did the appellant, otherwise, make nonfrivolous allegations that he had engaged in whistleblowing activity in this appeal.

The appellant has shown that he was an "employee" who was subjected to a "personnel action" under the WPA.

¶8 The appellant argues that the administrative judge erred in dismissing his appeal for lack of jurisdiction because he was an "employee" in the federal civil service, i.e., a GS-1102-11 Lead Contract Specialist with the Department of the Air Force, in 2006 and 2007 when the FCIP positions were filled, and because he also should have been considered an applicant for employment with the agency continuously since he had filed his original application with the agency in 2005. PFRF, Tab 1 at 2-3. The appellant further argues that, for the purposes of the WPA, an "appointment" is a "personnel action" and he is alleging in this appeal that the agency failed to appoint him to a position. *Id.* at 3.

¶9 The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). With regard to IRA appeals, the Board has jurisdiction over whistleblower claims filed pursuant to 5 U.S.C. § 1221(a). Section 1221(a) provides that

> an employee, former employee, or applicant for employment may, with respect to any personnel action taken, or proposed to be taken, against such employee, former employee, or applicant for

> employment, as a result of a prohibited personnel practice described in section 2302(b)(8), seek corrective action from [the Board].

5 U.S.C. § 1221(a). In section 2302(b)(8), the statute prohibits any employee who has authority to take, direct others to take, recommend, or approve any personnel action to

> (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of –
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> * * *
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> (B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—
>
> (i) a violation of any law, rule, or regulation.

5 U.S.C. § 2302(b)(8)(B)(i). It is well established that the WPA is a remedial statute, and we are required to construe its terms broadly. *See, e.g.*, *Fishbein v. Department of Health & Human Services*, 102 M.S.P.R. 4, ¶ 8 (2006) (because the WPA is remedial legislation, the Board will construe its provisions liberally to embrace all cases fairly within its scope, so as to effectuate the purpose of the Act). Further, our reviewing court has found that the language used in section 2302(b)(8) indicates that Congress's intent was to legislate in "broad terms" and that, "absent some exclusionary language, a cramped reading of the statute . . . would be counter to that intent." *See Reid v. Merit Systems Protection Board*, 508 F.3d 674, 677 (Fed. Cir. 2007) (under § 2302(b)(8)(A)(i), a reasonable belief that a violation of law is imminent is sufficient to confer jurisdiction and protected disclosures, thus, may include potential violations of law not carried out by the agency). Here, the plain language in the statute does not impose a limitation or use exclusionary language stating that a protected employee must work for the agency taking the alleged retaliatory personnel action. Therefore, we find that the appellant, as a current employee of the Department of the Air Force, met the definition of being an "employee" as contemplated by the statute when he filed his initial complaint with OSC and when the agency filled the

subject positions using FCIP.[1] *See Fishbein*, 102 M.S.P.R. 4, ¶ 12 (to be an employee under the WPA, an individual must meet the general definition of "employee" under title 5, U.S. Code, as established at 5 U.S.C. § 2105).

¶10 The administrative judge found below, and the agency contends on review, that the Board lacks jurisdiction over the appellant's appeal because he was never an employee of the agency that took the "personnel action." ID at 5; PFRF, Tab 3 at 3-8. In support of this argument, the agency contends that 5 U.S.C. § 2302(a)(2)(A) requires that a "personnel action" under the statute must be taken with respect to an "employee" in a covered position with the employing agency. *Id.* at 3. Section 2302(a)(2)(A) states that, for the purpose of this section--

> (A) "personnel action" means--
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> (i) an appointment;
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> (ii) a promotion;
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> (iii) an action under chapter 75 of this title or other disciplinary or corrective action;
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> (iv) a detail, transfer, or reassignment;
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> (v) a reinstatement;
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> (vi) a restoration;
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> (vii) a reemployment;
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> (viii) a performance evaluation under chapter 43 of this title;
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> (ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph;

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[1] Since we find that the appellant meets the definition of "employee," as it is defined in the WPA, it will be unnecessary to determine in this appeal whether the appellant also qualified as an "applicant for employment" under the statute on the basis of his prior application for employment with the agency in 2005.

> (x) a decision to order psychiatric testing or examination; and
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> (xi) any other significant change in duties, responsibilities, or working conditions;
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> with respect to an employee in, or applicant for, a covered position in an agency, and in the case of an alleged prohibited personnel practice described in subsection (b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31.

5 U.S.C. § 2302(a)(2)(A). We find that Congress's intent in drafting this provision was to protect whistleblowers from a broad range of possible retaliatory actions from government agencies. In particular, the pertinent language here, i.e., a personnel action means an appointment taken "with respect to an employee in . . . a covered position in an agency," does not impose a limitation or use exclusionary language stating that a protected employee must work for the agency taking the alleged retaliatory personnel action. Indeed, although many of the "personnel actions" listed above are ones that can be taken only by the employing agency of a whistleblower, there are several listed actions, such as a transfer, a detail, a restoration, and a reemployment, where another federal agency could be the authority taking the personnel action. *See* 5 C.F.R. § 210.102(18) (defining a transfer as a change of an employee, without a break in service, from a position in one agency to a position in another agency); 5 C.F.R. § 317.903 (defining a detail in the Senior Executive Service to include a temporary assignment to an outside agency); 5 C.F.R. Part 330, subpart G and Part 553 (authorizing a restoration or a reemployment of former employees to include placement in a position in another agency). Thus, the definition of "employee" and "personnel action" advocated by the agency is unduly restrictive because it would deny recourse to federal employees who are claiming whistleblower retaliation for personnel actions identified in the statute.

¶11 On review, the agency also relies on *Guzman v. Office of Personnel Management*, 53 F. App'x 927, 929 (Fed. Cir. 2002), which is a non-precedential

decision finding that a substantive violation of the WPA under section 2302(b)(8) must be taken against an "employee" or "applicant for employment," and not a "former employee." The Board may follow non-precedential decisions by our reviewing court to the extent that we find them to be persuasive. *Worley v. Office of Personnel Management*, 86 M.S.P.R. 237, ¶ 8 (2000). However, the court's decision in *Guzman* did not restrict the definition of "employee" to individuals who have worked for the agency that took the alleged retaliatory personnel action. In *Guzman*, the appellant had been employed by the Department of the Air Force in the Philippines. She alleged whistleblower retaliation by OPM when it denied her post-separation retirement application, arguing that OPM had misinterpreted the Civil Service Retirement System statute to find her ineligible for retirement. *Guzman*, 53 F. App'x at 928. The court found that, under the plain language in the WPA, although former employees may file appeals for corrective action, their appeals must concern personnel actions that occurred while they were an "employee" or "applicant for employment" with the federal government. *Id.* at 929. There is no language in the decision, however, indicating that jurisdiction was lacking because the appellant was not an employee of OPM, or that the appellant's employing agency, i.e., the Air Force, had taken no action in the appeal. Therefore, *Guzman* does not provide persuasive analysis that the term "employee" in the WPA is restricted to the individuals who are employed by the agency taking the personnel action. It only provides that a former employee's appeal rights are limited to actions taken while they were in the status of being an employee or applicant for employment. *See also Pasley v. Department of the Treasury*, 109 M.S.P.R. 105, ¶ 10 (2008) (finding the termination of a former federal employee by a private sector employer allegedly taken in retaliation for his protected disclosures during federal employment did not meet the definition of "personnel action" under the WPA).

¶12 Further, contrary to the agency's argument, a whistleblower does not need to be an employee, an applicant for employment or a former employee at the time he made his protected disclosures. In *Greenup v. Department of Agriculture*, 106

M.S.P.R. 202, ¶ 6 (2007), we found that a former Program Technician with a County Agricultural Stabilization and Conservation Committee, who had been a county employee and not a federal employee, could raise an IRA appeal alleging that the agency denied her an appointment to a federal position because of whistleblower protected disclosures that she made while a county employee. In *Greenup*, we determined that the statute does not specify that a disclosure must have been made when the individual seeking protection was either an employee or an applicant for employment. 106 M.S.P.R. 202, ¶ 8. Indeed, we noted that, in the case of applicants for employment, who are not federal employees at any time prior to their application, such a limitation would severely restrict any recourse they might otherwise have, since the disclosure would necessarily have to be made while their application was pending. Thus, we found that Congress did not intend to grant such a limited right of review, when it determined to protect applicants for employment. *Id.*

¶13 The agency alternatively argues on review that the Board does not have jurisdiction over this appeal because the appellant's allegation that it improperly used FCIP to fill vacancies in the Montana Field Office was not a "personnel action" for the purposes of the WPA, such as a transfer or a promotion. PFRF, Tab 3 at 8-9. In other words, the agency asserts that "the manner in which positions are advertised does not constitute a personnel action covered by 5 U.S.C. § 2302(a)." *Id.*, at 9.

¶14 The agency's argument again is an unduly narrow and cramped reading of the scope of the statute. The appellant has alleged in this appeal that, in the midst of continuing litigation in his first Board appeal and a related EEOC case, the agency failed to appoint him to several positions by knowingly and intentionally taking actions to insure that he was unaware of, and could not apply for, the positions at issue. IAF, Tab 1. Essentially, the appellant has alleged that the agency used FCIP as part of a scheme to deny him an "appointment" within the meaning of the WPA.

¶15 The Federal Circuit has found that the term "appointment," as used in the statute, covers an expansive range of acts and failures to act by an agency. In *Ruggieri v. Merit Systems Protection Board*, 454 F.3d 1323, 1325 (Fed. Cir. 2006), the Court said:

> The Whistleblower Protection Act contains a broad definition of "personnel action," which includes "an appointment." 5 U.S.C. § 2302(a)(2)(A)(i). The Act further provides that it is unlawful for an employee who is authorized to take or approve personnel actions to "take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant" because of any protected disclosure. Id. § 2302(b)(8). Thus, the Act covers the "failure" to make an "appointment" in the federal service when that action is because of a protected disclosure.

¶16 In *Ruggieri*, a former Coast Guard employee alleged that the Department of Energy retaliated against him on the basis that the agency did not select him for a position because of whistleblowing activities during his earlier employment with the Coast Guard.[2] *Ruggieri*, 454 F.3d at 1324-25. The agency contended that it had not taken a "personnel action" under the Act because it had not selected anyone from the vacancy announcement in which the appellant had applied. Instead, it later filled the position from a different vacancy announcement to which the appellant had not applied. *Id.* The Board dismissed the appeal for lack of jurisdiction because it determined that an agency's failure to make any selection from a vacancy announcement was not a "personnel action" under the WPA. *Id.* at 1325. The court reversed the decision and remanded the case because the agency's conduct, i.e., its decision to terminate the hiring process by canceling the vacancy announcement, was sufficient under the plain language of

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[2] With regard to the issue of whether a personnel action must be taken by an employee's employing agency, we note that the court in *Ruggieri* related the fact that the appellant had been an employee of the Coast Guard and the personnel action was taken by the Department of Energy. However, the court did not address this issue to any extent, and decided the case on the narrow issue of whether an agency's decision to cancel a vacancy announcement, and not to hire any applicant from it, was a "personnel action" under the WPA. *Ruggieri*, 454 F.3d at 1325.

the statute, to constitute a "fail[ure] to take . . . a personnel action." *Id.* at 1326-27. The court noted that to find otherwise would permit an agency to lawfully refuse to hire an employee because of whistleblowing activities, as long as it did not hire a different applicant under the particular vacancy announcement in which the whistleblower applied. The court said, "[n]othing in the statutory language or the underlying purpose of the Act suggests that Congress intended to endorse such a formalistic restriction on the type of agency action that would trigger the Whistleblower Protection Act." *Id.* at 1326.

¶17 The agency's interpretation of "appointment" in the instant case would similarly place an improper constraint on an individual's right to seek redress for whistleblower retaliation. Given that an agency's action can be considered a covered personnel action simply by leaving a position vacant and not filling it with anyone, then an agency could engage in a prohibited retaliatory personnel action by intentionally using a particular selection process as part of a scheme that would deny a whistleblower an opportunity to seek the appointment. Accordingly, we find that the appellant has shown that he was an "employee" who has sufficiently alleged that he was subjected to a retaliatory "personnel action" under the WPA.

The appellant, otherwise, has made a nonfrivolous allegation of whistleblower retaliation.

¶18 The Board has jurisdiction over an IRA appeal if the appellant has exhausted his administrative remedies before OSC and makes nonfrivolous allegations that: (1) he engaged in whistleblowing activity by making a protected disclosure, and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001). To meet the nonfrivolous standard, an appellant need only plead allegations of fact which, if proven, could show that he made a protected disclosure and that the disclosure was a contributing factor. *See Simone v. Department of the Treasury*, 105 M.S.P.R. 120, ¶ 8 (2007).

¶19 Whether allegations are nonfrivolous is determined on the basis of the written record. *Spencer v. Department of the Navy*, 327 F.3d 1354, 1356 (Fed. Cir. 2003); *Crenshaw v. Broadcasting Board of Governors*, 104 M.S.P.R. 475, ¶ 8 (2007). In determining whether the appellant has made a nonfrivolous allegation of jurisdiction entitling him to a hearing in an IRA appeal, the administrative judge may consider the agency's documentary submissions; however, to the extent that the agency's evidence constitutes mere factual contradiction of the appellant's otherwise adequate prima facie showing of jurisdiction, the administrative judge may not weigh evidence and resolve conflicting assertions of the parties, and the agency's evidence may not be dispositive. *Simone*, 105 M.S.P.R. 120, ¶ 8; *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994).

¶20 Here, it is undisputed that the appellant exhausted his remedy with OSC in regard to the failure of the agency to select him for several positions in its Montana Field Office in Kalispell, Montana. The appellant has also made nonfrivolous allegations that he made a protected disclosure. In his June 27, 2006 letter to OSC, the appellant alleged that the agency's use of the Outstanding Scholar Program to fill vacancies in Kalispell, Montana, was a violation of law, rule, or regulation. IAF, Tab 1, Subtabs 1, 2.

¶21 We make clear, however, that we are not finding, on the merits, that the appellant made disclosures that he reasonably believes evidence the kind of wrongdoing set forth at 5 U.S.C. § 2302(b)(8). The proper test for determining whether an individual had a reasonable belief that his disclosures revealed misconduct described by 5 U.S.C. § 2302(b)(8) is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the individual could reasonably conclude that the actions of the government evidence wrongdoing as defined by the WPA. *Lachance v. White*, 174 F.3d 1378 (Fed. Cir. 1999). On remand, as part of his burden of proof on the merits of his claim, the appellant must establish that he made disclosures which a reasonable person in his circumstances would believe evidence a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority,

or a substantial and specific danger to public health or safety. *See Francisco v. Office of Personnel Management*, 295 F.3d 1310, 1314 (Fed. Cir. 2002) (alleged disclosures were not covered by the WPA because they were merely legal arguments raised by the appellant in his own prior Board proceedings).

¶22 Likewise, we find that the appellant has made sufficient allegations to satisfy the jurisdictional standard set forth in *Yunus* that his alleged disclosures were a contributing factor in the determination not to appoint him to a position. The appellant states in this appeal that, while it was aware of his continuing interest in working in Kalispell, Montana, and shortly after he filed his complaint with OSC, the agency retaliated against him by knowingly and intentionally concealing several vacancies in the Montana Field Office from him and by filling the vacancies through restricted recruitment efforts limited to University of Montana students without any public announcement. IAF, Tab 1. He has not specifically alleged that the selecting official and other agency officials involved in the hiring actions knew of his protected activity. However, the Board has held that an appellant can show that a disclosure described under 5 U.S.C. § 2302(b)(8) was a contributing factor in a personnel action by proving that the official taking the action had "constructive," i.e., imputed, knowledge of the protected disclosure. *Marchese v. Department of the Navy*, 65 M.S.P.R. 104, 108 (1994). An appellant may establish imputed knowledge by demonstrating that an individual with actual knowledge of the disclosure influenced the official accused of taking the retaliatory action. *Id.* Here, the appellant has alleged that the agency's representative in his other appeals had actual knowledge of his disclosures and that she was advising the management officials who filled the positions at issue. IAF, Tab 1. On remand, the appellant will have an opportunity to present evidence and argument to show that the selecting official for the positions had either actual knowledge or constructive knowledge, and that his disclosures were a contributing factor in the agency's decision to restrict the hiring process only to University of Montana students, using FCIP.

¶23 If the appellant establishes the elements of his claim, the Board will order corrective action, unless the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action absent the disclosure. *Conrad v. Department of Justice*, 99 M.S.P.R. 636, ¶ 18 (2005). The agency will have an opportunity to make that showing on remand.

¶24 Accordingly, we REVERSE the ID and find that the Board has jurisdiction over this IRA appeal.

ORDER

¶25 We REMAND this IRA appeal to the administrative judge for further adjudication, including a hearing, consistent with this Opinion and Order. The administrative judge may in her own discretion join this appeal with the appellant's VEOA and USERRA appeals. *See* 5 C.F.R. § 1201.36.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.